THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0758, Town of Wakefield v. Donald McMullin, the court on January 28, 2010, issued the following order:

The defendant, Donald McMullin, appeals an order of the trial court addressing a cease and desist order issued by the Town of Wakefield (town). He argues that the trial court erred in finding that he violated town ordinances and state statutes, and in failing to find that the town's action was barred by laches. We affirm.

The defendant first challenges the sufficiency of the evidence, arguing that the town failed to establish that: (1) his property is a junk yard; (2) the trailers on his property are structures; (3) the metal garage that he built to replace one that had burned down needed a permit; and (4) he cut trees in violation of both a town ordinance and state statutes.

We turn first to the question of whether the town established that his property was a junk yard pursuant to RSA 236:112 (2009). RSA 236:112, I(c) defines a motor vehicle junk yard as "any place . . . where the following are stored or deposited in a quantity equal in bulk to 2 or more motor vehicles:

(1) Motor vehicles which are no longer intended or in condition for legal use according to their original purpose including motor vehicles purchased for the purpose of dismantling the vehicles for parts or for use of the metal for scrap; and/or

(2) Used parts of motor vehicles or old iron, metal, glass, paper, cordage or other waste or discarded or secondhand material which has been a part, or intended to be a part, of any motor vehicle."

The defendant argues that the town failed to establish that he had two or more non-operational cars on his property. The trial court had an opportunity to examine the evidence, including photographs, and assess the credibility of the witnesses. The trial court found, after hearing testimony and examining photographs "showing numerous vehicles, boats, and even a partially dismantled aircraft," that "[a]lthough some of the vehicles are arguably roadworthy, clearly others are not." Because there is evidence in the record to support this finding, we affirm it.

The defendant also argues that the trial court shifted the burden in determining that his property fell under the definition of a motor vehicle

junkyard. We disagree. Having found that the defendant had the equivalent of two or more vehicles that were not in condition for legal use, the trial court concluded that the defendant's property fell under the statutory definition of junk yard. Contrary to the defendant's assertion, the trial court did not shift the burden to him to establish that his property should not be classified as a junk yard; rather, the court gave the defendant an opportunity to establish which vehicles were roadworthy and thus exempt from the statutory two vehicle limit. Accord Lisbon Sch. Comm. v. Lisbon Ed. Ass'n, 438 A.2d 239, 243 (Me. 1981).

We turn then to whether the commercial box trailers (trailers) on the defendant's property are structures as contemplated under the town's building code. The parties agree that the trailers have been on the defendant's property since the late 1980's. The ordinances cited by the parties define "building" as an "independent structure"; the parties cite no provision that defines "structure." Whether the trailers constitute structures requires interpretation of the zoning ordinance, which, as a question of law, we review de novo. Harrington v. Town of Warner, 152 N.H. 74, 79 (2004). Because the traditional rules of statutory construction generally govern our review, the words and phrases of an ordinance are construed according to the common and approved usage of the language. Id. A "structure" is defined in relevant part as "something constructed or built." Webster's Third New International Dictionary 2266 (unabridged ed. 2002); see also The Oxford American Dictionary and Thesaurus 1514 (2003) ("a whole constructed unit, esp., a building"). It is clear that the definition of "structure" is broader than "building." Accordingly, it is useful to examine our case law construing the term "building."

In Appeal of Town of Pelham, 143 N.H. 536 (1999), we were asked to determine whether trailers constituted buildings and were thus taxable under RSA chapter 72. Although we construed the term for purposes of taxation statutes, we considered its plain meaning and thus find our analysis useful in this case. In Pelham, we set forth the definition of a building, which included "a thing built: a: a constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls." Id. at 538. We went on to find that, although the trailers in Pelham were not stationary, their use as storage sheds was entirely consistent with the plain meaning of "buildings." We held that the following factors were relevant in determining whether the trailers constituted buildings: whether the trailers by their use: (1) were intended to be more or less permanent; (2) were more or less completely enclosed; (3) were used as a dwelling, storehouse or shelter; and (4) were intended to remain stationary. Id. at 539. Because the evidence in the record before us supports findings consistent with this definition, we affirm this portion of the trial court's order.

The defendant next argues that the trial court erred in concluding that he needed a permit to construct the metal garage currently on his property. He argues that because the garage allegedly replaced a garage that had burned, it was not new. He provides no persuasive authority, however, to support his

position that the metal garage was not "new" within the meaning of the cited ordinance. We turn then to the plain meaning of "new": "having existed or been made but a short time: having originated or occurred lately." Webster's Third New International Dictionary 1523 (unabridged ed. 2002). The evidence supports a finding that the metal garage was a new building within the scope of this definition. Accordingly, the trial court correctly determined that, as a new building, the metal garage was subject to the town's building regulations.

The defendant also argues that the trial court erred in finding that he cut trees in violation of both state statutes and local ordinances. After reviewing testimony and photographic evidence, the trial court found that the defendant violated the Shoreland Protection Act (RSA chapter 483-B). The trial court not only received testimony but also photographic evidence on this issue. Because there is evidence to support this finding, we affirm it.

The trial court also found that the defendant violated the zoning ordinance by cutting "at least one tree and brush" located within the access road and the twenty-foot buffer zone. On appeal, the defendant challenges only the trial court's finding that he cut a tree within twenty feet of the buffer zone. Even assuming that the trial court erred in its finding concerning the tree, the defendant does not challenge the trial court's finding that he unlawfully cut brush within the twenty-foot buffer zone without first obtaining a permit. Because that finding would support the relief awarded by the trial court, any alleged error would be harmless.

Finally, the defendant argues that the trial court erred in not finding that the town's actions were barred by laches. We have previously emphasized that laches may bar an action by government entities only in extraordinary and compelling circumstances. Town of Seabrook v. Vachon Management, 144 N.H. 660, 668 (2000). Because it is an equitable doctrine, laches will constitute a bar to suit only if the delay was unreasonable and prejudicial. Id. The party asserting laches bears the burden of establishing that the delay was both unreasonable and prejudicial. Id. That the defendant's actions may have continued in violation of town ordinances for several years is not sufficient to establish prejudice. Because the record provides no evidence that any delay in the town enforcement action was prejudicial, we disagree that the trial court erred on this issue.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk

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